SUPREME COURT, U. S.

FILED

MAR 14 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1019

CHAS. PFIZER & CO., INC., *Petitioner*,

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY MEMORANDUM

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The Federal Trade Commission has made no response whatever to one of the three questions presented by petitioner, and has dealt with another only in a footnote. This reply is accordingly filed in the view that brief examination of the questions the Commission so obviously seeks to avoid will assist in evaluating the present petition.

First. Petitioner's Question No. 2, which the Commission passes by with impressive silence, goes to what this

Court in *Craig* v. *Harney,* 331 U.S. 367, 377, called "the integrity of the trial," and to what the Chief Justice has characterized (concurring in *Burgett* v. *Texas,* 389 U.S. 109, 117) as "the integrity of the fact-finding process." As presented, that question read (Pet. 3):

> "2. Whether the infected state of the present record, resulting (a) from the participation of the disqualified Commissioner who had served as prosecutor for the Senate Subcommittee, (b) from the verbatim copying of complaint counsel's requests for findings, and (c) from the reliance on the patent examiner's testimony of his reconstructed mental processes, will support the order of the Federal Trade Commission."

This Court has been astute to view realistically the potential existence of substantial unfairness in any proceeding quite apart from specific proof of prejudice. Just this Term it has said (*Commonwealth Corp.* v. *Casualty Co.,* 393 U.S. 145, 150) that "any tribunal permitted by law to try cases and controversies not only must be unbiased but must avoid even the appearance of bias." Earlier, in *Offutt* v. *United States,* 348 U.S. 11, 14, the Court emphasized that "justice must satisfy the appearance of justice," language quoted with approval in *In re Murchison,* 349 U.S. 133, 136, where the Court added (*loc. cit.*) that "our system of law has always endeavored to prevent even the probability of unfairness."

Here the probability of unfairness was obvious. The Chairman of the Commission had earlier, while Counsel to a Senate Subcommittee, dealt with the identical question of petitioner's alleged fraud on the Patent Office that later came before the Commission in the proceeding now sought to be reviewed here. When he refused to disqualify himself, and was sustained in such refusal by the full Commission, the court below held that he was disqualified as a matter of law, and set aside the Commission's first order. 363 F. 2d 757.

We said (Pet. 15-16) that "it is entirely unrealistic to suppose that the Chairman's participation in the Commissions first decision did not contribute to that body's rejection of its initial hearing examiner's findings, which, on a record extending to 11,000 pages of testimony subjected to cross-examination, plus 8,000 additional pages of documents, were favorable to petitioner on the very issues that had been before the Senate Subcommittee *ex parte* before it was submitted to the Commission."

It is similarly unrealistic to suppose that the Chairman's influence on the Commission's first findings disappeared with his disqualification. The second hearing examiner did not reexamine the case, but instead simply adopted as his own extensive findings of fact requested by complaint counsel, typographical errors and all (Pet. 16 and n. 6). Such mechanical rubber-stamping of one side's contentions, which was so strongly condemned by this Court in an arm's-length adversary proceeding (*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657), is infinitely more destructive of fairness when, as here, the several functions of accusation, prosecution, hearing, and decision are lodged in a single agency.

For, by the time that the second hearing examiner reported, the search for truth had, all too plainly, been abandoned, and there was substituted a contest between the Commission as an institution and the respondent, now petitioner here, who had successfully worsted that body in their first judicial contest. These are not, plainly enough, matters susceptible of mathematical proof. But, as this Court had said in another situation involving the integrity of the fact-finding process (*Estes* v. *Texas*, 381 U.S. 532, 547), "There is little wonder that the defendant cannot 'prove' the existence of such factors. Yet we all know from experience that they exist."

In our view, the irregularities of which we complain go not just to the unfairness of the present vitiated proceed-

ing, they involve the very integrity of the whole administrative process. Yet the Commission's reply is only silence—mute testimony to its inability to answer the grave, and we submit, deeply disturbing charges presented in our Question No. 2.

Second. The Commission also evades petitioner's Question No. 1, as follows (Pet. 3):

> "1. Whether it was proper to permit inquiry into the patent examiner's mental processes, particularly where his testimony contradicted contemporaneous documents in the Patent Office record, and where the opinion of the court below shows on its face that it relied only on the examiner's direct testimony and ignored entirely his admissions on cross-examination that he was without any present recollection of what had transpired eleven years earlier."

The Commission deals with this second grave question by asserting that petitioner originally insisted on the patent examiner being called (Br. Op. 14-15), and by then arguing—in a footnote—that the rule proscribing inquiry into the mental processes of judicial or quasi-judicial officers is inapplicable.

Surely it is strange doctrine that insistence on the calling of a particular individual as a witness amounts to a waiver both of the standards for his testimonial qualification and of the rules governing the competency of the questions he will be asked. Yet that is precisely what the Commission is urging on the Court.

Of course the patent examiner's testimony was essential, in that he was one who could say what he had requested and what had been given him. But that circumstance could not add weight to what he actually testified after his recollection had faded, nor would it excuse the reviewing court's utter disregard of his repeated admissions of lack of recollection.

Nor, preeminently, could insistence that the patent examiner be called to testify to facts—what he had requested, and what he had received—be transformed into a consent to embark upon inquiry into his mental processes, particularly in the face of specifically articulated, contemporaneous, and continuing objection to such inquiry (217S-218S). This last is an area long and consistently closed to examination by a long and unbroken line of decisions (Pet. 11), of which the two *Morgan* cases are simply the best remembered because the most recent. *Morgan* v. *United States,* 304 U.S. 1, 18 ("it was not the function of the court to probe the mental processes of the Secretary"); *Unitd States* v. *Morgan,* 313 U.S. 409, 422 ("the short of the business is that the Secretary should never have been subjected to this examination").

Neither the *Morgan* cases nor any of their predecessors have ever been questioned or qualified here in the slightest. The Commission's footnote (Br. Op. 14-15, n. 8) cites two court of appeals' decisions to support its view that the *Morgan* principle is inapposite. But the first of these (*United States* v. *Aleli,* 170 F. 2d 18, 20 [C.A. 3]) reflects no awareness of the principle, while the second (*Singer Sewing Machine Co.* v. *NLRB,* 329 F. 2d 200, 206-208 [C.A. 4]) holds the *Morgan* rule inapplicable to a case of alleged misconduct by the hearing officer, on the strength of the two *Accardi* cases here, 347 U.S. 260 and 349 U.S. 280. It seems sufficient to say that here there is not the slightest intimation of misconduct, and that neither *Accardi* decision questions, much less cites, the *Morgan* cases —which is no doubt why the Commission does not cite, much less rely upon, the *Accardi* cases in its footnote.

The short of the matter, to paraphrase this Court's language in the final *Morgan* case, 313 U.S. at 422, is that the patent examiner should never have been questioned concerning his mental processes, and that because he was, and because (as we have already demonstrated in detail, Pet.

10-11) his speculations concerning his own mental processes years previously became the determinative factor in the present proceeding, the irregularity is too great to be allowed to pass unreviewed.

In this aspect, also, the integrity of the administrative process is drawn into serious question.

Third. The only one of petitioner's questions that the Commission is prepared to meet head-on is No. 3 (Pet. 3), "Whether * * * the Federal Trade Commission has statutory power to decree affirmative relief that goes beyond the order to 'cease and desist' that is authorized by Section 5(b) of the Federal Trade Commission Act."

Petitioner does not dispute for a minute (Br. Op. 16) "that the Commission has wide discretion to frame its orders so as to assure prompt and complete rectification of the violations it has found," nor that (Br. Op. 17) "The Commission's judgment will not be set aside unless the remedy chosen lacks any reasonable relationship to the unlawful practices it seeks to correct."

But every case cited by the Commission for those propositions dealt solely with the scope of a cease and desist order, and such order was approved because it came within the statutory grant. No decision here supports the Commission's proposition (Br. Op. 17) that the failure of Section 5(b) to authorize affirmative relief is "immaterial".

Accordingly, petitioner reaffirms its contention that the Commission's power under the Act (Sec. 5(b), Pet. 4) is limited to issuing cease and desist orders and that the Commission has never been empowered to grant affirmative relief—in short, that "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers." *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619, 623. *Accord, Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587, 598:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may

> make only such orders as the Act authorizes; it may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 723."

To this the Commission replies (Br. Op. 17) that "*Eastman Kodak* reflects an earlier, now discredited, view of a restricted remedial discretion of administrative agencies," and that it was "specifically rejected in *Federal Trade Commisison* v. *Dean Foods*, 384 U.S. 597, 606, n. 4."

Examination of the cited footnote shows that the authorities there relied on were *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 312-313, nn. 17-18, a case involving the powers of the Civil Aeronautics Board, and *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 129-131, a case dealing with the powers of the Interstate Commerce Commission.

How either of those cases, which deal with and turn on the terms of regulatory statutes having a wholly different content and a wholly different historical pattern, are competent to enlarge the scope of the "cease and desist" authority granted by Congress to a third agency, is not explained in the *Dean Foods* footnote, nor in the Commission's brief in opposition, nor could it be. This Court has frequently pointed out the distinctions between the scope of the relief authorized in merger cases, and that available under Section 5(b) of the Federal Trade Commission Act, emphasizing that an agency's remedial power to order affirmative relief under the Sherman and Clayton Acts is to be distinguished from the Trade Commission's restricted power to issue cease and desist orders under Section 5(b). *United States* v. *Philadelphia National Bank*,

374 U.S. 321, 339-40, n. 17; *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 312-13, n. 17 (Sherman Act; problem within purview of agency granted exclusive regulatory power for industry, citing *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619, 623).

We submit that, before the scope of an Act of Congress first enacted more than half a century ago, and consistently construed by this Court for over fory years in scrupulous adherence to its statutory language, is suddenly enlarged in reliance on an untenable footnote dictum in a closely divided case involving a wholly different question—*Dean Foods*, after all, turned on the scope of the All Writs provision quite as much as on the Commission's power—this Court should undertake plenary consideration of the issue.

CONCLUSION

For the foregoing additional reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1969.